IN THE UNITED STATES BANKRUPTCY COURT

FOR THE

SOUTHERN DISTRICT OF GEORGIA
Augusta Division

IN RE:	)	Chapter 13 Case
	)	Number 99-11383
HARRY JACKSON	)	
GISELA JACKSON	)	
	)	
Debtors	)	
	)	
HARRY JACKSON	)	FILED
GISELA JACKSON	)	at 11 O'clock & 43 min A.M.
	)	Date: 9-27-00
Plaintiffs	)	
	)	
vs.	)	Adversary Proceeding
	)	Number 99-01117A
AMERICAN GENERAL FINANCE, INC.	)	
	)	
Defendant.	)	

ORDER

On October 28, 1999, Harry and Gisela Jackson ("Debtors") filed this adversary proceeding seeking damages under 11 U.S.C. §362(h) for a violation of 11 U.S.C. §362(a)(4). The violation occurred when American General Finance("Defendant") recorded a UCC-1 statement three months after Debtor filed for bankruptcy relief. Debtors filed a motion for summary judgment on March 15, 2000.

Because there are material facts unresolved as to the issue of damages only, the Debtors' motion for summary judgement is granted in part and denied in part.

The undisputed facts are as follows. Debtors filed a Chapter 13 case on June 8, 1999. Defendant was notified of the filing on July 14, 1999. On July 19, 1999, Defendant filed a secured Proof of Claim in the amount of $7,142.27. On August 20, 1999, Defendant filed an objection to confirmation. On September 15, 1999, Defendant filed for record a UCC-1 Statement covering personal property of the Debtor as follows: computer with printer, Panasonic T.V. and VCR, and GE Camcorder.

Federal Rule of Bankruptcy Procedure 7056 incorporates Rule 56 of the Federal Rules of Civil Procedure. Under Rule 56, this Court will grant summary judgment only if ". . . there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). The moving party has the burden of establishing its right of summary judgment. See Clark v. Coats & Clark, Inc., 929 F.2d 604, 608 (11th Cir. 1991). The evidence must be viewed in a light most favorable to the party opposing the motion. See Adickes v. S.H.Kress & Co., 398 U.S. 144, 57, 90 S.Ct. 1598, 1608, 26 L.Ed. 2d 142 (1970). However, the nonmovant cannot rely on mere allegations to defeat a

motion for summary judgment. LaChance v. Duffy's Draft House, Inc., 146 F.3d 832, 835 (11th Cir. 1998). The Court has jurisdiction to hear this matter as a core bankruptcy proceeding under 28 U.S.C. § 157(b)(2)(A) & (O) and 28 U.S.C. § 1334 (1994).

The parties concede that a technical violation has occurred under 11 U.S.C. §362(a)(4) which provides in pertinent part:

> (a) Except as provided in subsection (b) of this section, a petition filed under section 301, 302, or 303 of this title, . . . operates as a stay, applicable to all entities, of--
>
> (4) any act to create, perfect, or enforce any lien against property of the estate;

In order to recover damages the violation must be willful. Section 362(h) provides: "An individual injured by any *willful* violation of a stay provided by this section shall recover actual damages, including costs and attorneys' fees, and, in appropriate circumstances, may recover punitive damages."(emphasis added). "Willful" is defined to mean "simply acting intentionally or deliberately knowing of the bankruptcy petition." Blackmon v. MFC Financial Services, (In re Blackmon), Adversary No. 91-1009, September 22, 1991 (Dalis,J.). Furthermore, a violation is presumed

to be intentional if done with actual notice of the bankruptcy petition. Washington v. Internal Revenue Service,(Matter of Washington) 172 B.R. 415, 419 (Bankr. S.D.Ga. 1994), aff'd in part,vacated in part, In re Washington, 184 B.R. 172 (S.D.Ga. 1995).

The Defendant had actual notice of the bankruptcy petition when the UCC-1 Statement was filed. Before the UCC-1 statement was filed, Defendant had filed a proof of claim and an objection to confirmation in Debtor's case. Therefore, the UCC-1 filing is presumed as intentional. Washington, 172 B.R. at 419. In an attempt to rebut this presumption, Defendant claims excusable oversight and inadvertence for failing promptly to file the UCC-1 statement. Defendant avers that a prepetition loan was made to Debtors and a security interest taken in the above-stated household goods. The UCC-1 statement was put in a stack with other papers to be filed. Defendant claims that due to under staffing there was a three month

delay in filing for record.

These facts even if proven would be immaterial. The first defense of excusable oversight fails as a matter of law. Affirmative steps must be taken to avoid even a technical violation of the automatic stay. In re Elder, 12 B.R. 491 (Bankr.M.D.Ga.

1981).[1] Upon learning of the petition, Defendant had an affirmative duty to make sure their actions did not violate the automatic stay and the defendant neglected this duty. Under staffing is no excuse.

Similarly, the defense of inadvertence also fails. The court in In re Walters, 219 B.R. 520, 526 (Bankr.W.D.Ark. 1998) reviewed the case law concerning the definition of "inadvertence" and concluded that

> inadvertence, even through 'computer activity' does not negate either the fact of a violation or willfulness if there is knowledge of the bankruptcy case. In re Taylor, 190 B.R. 459

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[1] (N)o action is unacceptable; no action is action to thwart the effectiveness of the automatic stay. The only thing that the debtor can do is to make certain that all entities involved know about the filing of the bankruptcy case which automatically invokes the stay. The facts disclose that all entities were aware of the pending bankruptcy in ample time to give effect to the automatic stay. Each choose to do nothing with the result that City continued to periodically deduct from Debtor's wages, the very thing that the automatic stay was intended to avoid. Elder at 494.

(Bankr.S.D.Fla.1995). A willful violation of the stay does not require a specific intent to violate the stay...(T)he term "inadvertent" is used to mean acts taken without knowledge of the stay. Id.; accord In re Atkins, 176 B.R. 998 (Bankr.D.Minn.1994) (creditor had affirmative duty to ensure that bench warrant was withdrawn); In re Koch, 197 B.R. 654 (Bankr.W.D.Wis.1996) (creditor violated stay by accepting $71.41 garnished wages, even though the creditor's interest attached prior to the petition, because the debtor retained an interest at the time of filing. The retention was not inadvertent because the creditor knew the stay had been imposed). Id.

In the present case, the defendant knew of the petition and did not take steps to ensure that the UCC-1 statement was not filed to avoid the stay violation. Defendant's actions were not inadvertent because they were done with full knowledge of the bankruptcy filing. Defendant has not alleged facts sufficient to overcome the presumption that its actions were willful.

Therefore, viewing the facts most favorably to the

nonmoving party Debtor's motion for summary judgement establishing a willful violation of 11 U.S.C. §362(a)(4) is ORDERED granted. The clerk will issue notice of trial on the issue of damages.

JOHN S. DALIS
CHIEF UNITED STATES BANKRUPTCY JUDGE

Dated at Augusta, Georgia

this 27th Day of September, 2000.